Supreme Court, U.S.
FILED
NOV 2 - 1999
OFFICE OF THE CLERK

(4)

No. 99-296

In The

Supreme Court of the United States

DEBRA WALKER, ET AL.,

Petitioners,

v.

CITY OF MESQUITE, TX; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

FLORENCE WAGMAN ROISMAN
735 West New York Street
Indianapolis, IN 46202
317-274-8523

MICHAEL M. DANIEL
Counsel of Record
LAURA B. BESHARA
3301 Elm Street
Dallas, TX 75226
214-939-9230

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5P

REPLY BRIEF FOR PETITIONERS

The homeowner respondents waived filing an opposition to certiorari but oppose the petition on the grounds that the court of appeals' decision was correctly decided. [Sept. 16, 1999 letter from Robert E. Goodfriend to William K. Suter, Clerk, Supreme Court of the United States]. The Federal Respondent has filed a forceful argument that the court of appeals' judgment is erroneous, that the homeowners were not denied equal protection of the law, and that the appeals court misapplied the controlling remedial principles set out by this Court in *United States v. Paradise*, 480 U.S. 149 (1987) and other cases. [Brief for the Federal Respondent in Opposition, pages 12 n.6, 14, 17].

Despite its persuasive analysis of the court of appeals' errors, the Federal Respondent opposes review of the judgment on several grounds: a) that the court of appeals also misapprehended the facts of the case thus making the decision fact bound; b) the judgment is interlocutory since the district court may still enter a race-conscious remedy on remand; and c) the judgment does not squarely conflict with any other court of appeals opinion.

The Federal Respondent leaves unanswered petitioners' arguments that the erroneous decision was caused by the appeals court's usurpation of the primary role of the district court in assessing the appropriate remedy and that the decision contradicts a longstanding national policy – endorsed by this Court, implemented by HUD, and applied by other circuit courts of appeals – that acknowledges the necessity of using race-conscious

site selection to remedy public housing segregation. In addition, the court of appeals' decision does squarely conflict with the Federal Respondent's interpretation of the Second Circuit's opinion in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988). With respect to the declaratory judgment in favor of petitioners entered by the district court, the court of appeals' judgment vacating that judgment is not interlocutory.

1. The court of appeals did not just misapprehend some of the facts in this case. As Petitioners argue, one of the grounds for granting the writ of certiorari is that the appeals court misapprehended its entire role in the remedial process [Pet. 19-23]. The district court made specific findings that, as of the 1994 hearing for the 1995 remedial order, the Section 8 program itself was still marked by the vestiges of the acknowledged, overt segregation. The district court further found that the implementation of the Section 8 remedy since the 1995 remedial order showed that the continued existence of barriers to the use of Section 8 in white areas precluded exclusive reliance on the use of that program to remedy the racially segregated site selection decisions of the defendants [Pet. App. 51, 54, 86, 99-100, 140-148, 152].

The court of appeals did not misapprehend that these were the district court findings. It did not rule that the findings were clearly erroneous or even unsupported by sufficient evidence [Pet. App. 24]. Instead, the court of appeals chose to use its view of the progress of the Section 8 program as revised by the remedial order to strike down the district court's public housing remedy. The court of appeals re-balanced its view of the record

with the results obtained under two years of the new remedial Section 8 program and found that those results "transcended" all of the findings on existing barriers to the desegregation of the Section 8 program. [Pet. App. 24]. The Federal Respondent did not rebut, or even mention, petitioners' argument that certiorari should be granted because the court of appeals could reach its erroneous decision only by usurping the district court's discretion to choose a remedy after balancing the competing interests within statutory and constitutional limitations. *U.S. v. Paradise*, 480 U.S. at 183-184; *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995). The court of appeals' violation of the clear and well-established allocation of remedial responsibility is the primary flaw in the judgment which the Federal Respondent recognizes is marked by numerous and serious legal errors.

2. The court of appeals' judgment vacating the declaratory judgment is not interlocutory. Petitioners obtained a declaratory judgment that the 1995 remedial order at issue was constitutional [Pet. App. 3]. The court of appeals specifically vacated that declaratory judgment [Pet. App. 35]. Even if a new race-conscious site selection remedy were entered on remand, that declaratory judgment will have been permanently vacated.

3. Petitioners' argument that this Court should review the judgment because of the conflict between the court of appeals' decision and the national policy requiring the use of race-conscious remedies was not answered by the Federal Respondents. The national policy has been approved by this Court. *Hills v. Gautreaux*, 425 U.S. 284, 301 (1976). The national policy is contained in HUD's site selection regulations for public housing. 24 CFR

§ 941.202(c). The national policy was directly applied by the Second Circuit when it affirmed the race-conscious site selection remedy in *Yonkers*, 837 F.2d at 1236. [Fed. Res. Op. 20 n.10].

As the Federal Respondent points out, neither the policy, the regulations, nor the various courts of appeals' decisions requiring the use of racial classifications even discuss, much less require the "last resort" and exhaustion of race-neutral remedies steps imported into desegregation law by the Fifth Circuit. [Fed. Res. Op. 20-21]. The conflict is clear. The policy does not limit race-conscious remedial steps to the "last resort"; only the Fifth Circuit does.

The Federal Respondent all but acknowledges the split in the circuits when it takes direct issue with the Fifth Circuit's attempt to distinguish the Second Circuit's approval of a race-conscious site selection remedy in the *Yonkers* case. [Fed. Res. Op. 20 n.10]. To be sure, the facts in both cases are somewhat different, but that difference is inevitable given the specific factual focus in all cases involving the use of race-conscious remedies. The major fact difference is the party objecting. In *Yonkers*, the City was the party objecting to public housing in white areas. *Yonkers*, 837 F.2d at 1184. In this case, it is the homeowners in the white areas. But more important than the identity of the party objecting to the race-conscious remedy is the complete difference in approaches to the issue of remedy between the Fifth Circuit and the Second Circuit.

The conflict between the Fifth Circuit's decision, the national policy, and the judicial application of that policy warrants review by this Court.

For the foregoing reasons and those stated in the petition, Petitioners respectfully request that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL M. DANIEL
Counsel of Record
LAURA BETH BESHARA
MICHAEL M. DANIEL, P.C.
3301 Elm Street
Dallas, TX 75226-1637
214-939-9230

FLORENCE WAGMAN ROISMAN
735 West New York Street
Indianapolis, IN 46202
317-274-8523

Attorneys for Petitioners